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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 163

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,
and
DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Appellants,

v.

RINGSBY TRUCK LINES, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF IN RESPONSE TO MEMORANDUM OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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In their memorandum to this Court, the United States and the Interstate Commerce Commission suggest that the district court's judgment might be summarily affirmed, as the first question raised on this appeal is insubstantial; and the second, moot. The first question relates to the restraint on the Commission's order imposed and kept in force, in contraven-

tion of statutory mandate. The second involves the district court's judgment on the merits and the effect of the Commission's response to the court's remand on the right of a party to appeal. A third question, of which the memorandum makes no mention, relates to motions affecting remedies of the parties that were left undetermined by the district court to the prejudice of the parties' substantial rights.

The position assumed in the memorandum is vulnerable to its own contradictions. The United States and the Commission acknowledge (p. 3) that the Commission order directing cancellation of the rate increase schedules would not expose the carriers to irreparable injury if permitted to become effective pending judicial review. Yet they view the district court's action in restraining the Commission's order from September 9, 1966 to January 5, 1967 on findings of irreparable injury, as presenting no substantial question. The memorandum states (p. 4) that this question is not moot inasmuch as "it would affect appellants' claims for restitution of charges paid under the increased rates". Yet it designates as moot the district court's judgment on the merits to which the claims for restitution, admittedly not moot, are hinged. Reversal of the district court's ruling on the merits fixes the right of restitutional recovery. *Restatement, Restitution,* § 74 (1937). In *Arkadelphia Milling Co.* v. *St. Louis S.W. Ry.*, 249 U.S. 134 (1919), this Court, on reaching the decision that the judgment of the court below holding a rate order invalid should be reversed, required the railroad to return to shippers the excess rates collected when the Commission's order was enjoined.

One sentence stands out starkly from the recital of facts in the memorandum (p. 2): "The Commission's order never became effective." It seems reasonable to suppose that the United States and the Commission wanted to see effective an order directing cancellation of rate increase schedules found unjustified by the evidence. The United States and the Commission vigorously defended the Commission's order, under attack in the court below, as amply supported by the record, by the findings and by the report. When, following remand, the Commission issued a second report, it emphatically reaffirmed the correctness of its prior decision and reiterated its earlier order directing cancellation of the offending rate schedules (JS App. C). To the government parties, when confronted by the district court's judgment which set aside the Commission's first order, response to the remand may have appeared the simplest course to follow. They elected not to file an appeal. No such avenue was open to the shipper parties. $2,370,627 in excess charges, at the very least,* were collected by the carriers during the period the Commission's order lay under the court's restraint. If the court's judgment on the merits is erroneous, such charges were wrongfully exacted and shippers can only be made whole by restitution. See 73 Harvard Law Review, 333 at 348. To the shipper parties, the prosecution of

* The plaintiff carriers, in applying for a restraining order, supplied a guide to the measure of the pecuniary effect of the increases in issue. Revenues accruing from the increases were estimated to total $29,267 per working day for only 15 of the 1400 carrier participants in the tariffs (JS 17). For 81 working days in the period from September 12, 1966 to January 5, 1967, this totals $2,370,627 in excess revenues collected during the period of restraint for only 15 of the 1400 carriers participating in the tariffs.

this appeal is the only method of enforcing their right to just and reasonable rates stemming from the provenance of the Commission's first order. The question presented by the appeal as to the district court's ruling on the merits, is clearly not moot. That question, and the others presented, are substantial and merit plenary review.

1. The memorandum concedes error in the finding of irreparable injury by the court below, but dilutes its force by observing that it was not so unreasonable "as to be clearly erroneous". This betrays a latent misconception of the nature of the order under review. The order sought to be restrained is of a type frequently issued by the Commission. It entails consequences well understood by carriers and shippers. The order, after plenary hearing, directed the carriers to cancel rate increase schedules found unjustified by the evidence. The carrier was left free to republish rates at any level it believed it could justify. Such an order is altogether different from a rate-prescribing order which fixes rate-levels or sets minimum rates. A rate-prescribing order may indeed, if not restrained, operate to inflict irreparable injury on the carriers. An order directing the cancellation of schedules is constitutionally incapable of causing irreparable injury. As in *Middlewest Motor Freight Bureau* v. *United States,* D.C. Minn., 4th Div. 4-65 C.A. 285 (JS 11-12; JS App. D5), carriers may invoke their privilege to publish new increase tariffs immediately after the cancellation order takes effect so that irreparable injury cannot ensue. Nor is the carriers' right to review the Commission's order impaired by compliance with the cancellation order and republication of rate

increases. *Consolidated Freightways* v. *United States*, W.D. Washington N.D., C.A. No. 6990 (JS 12). As an order directing cancellation of increase schedules does not preclude the carrier from publishing new increase tariffs, it is incapable, virtually as a matter of law, of causing irreparable injury.

Stott v. *United States*, 154 F. Supp. (S.D. 1957), cited in the memorandum on the question of the court's discretion to restrain, dealt only with a temporary restraining order rather than interlocutory injunction. Even so, the court limned legal boundaries to judicial discretion. It said:

> "A temporary restraining order against the enforcement of the order of a governmental agency is a drastic remedy and will not be granted except upon a strong showing of necessity and desirability. Plaintiffs must show that specific, probable and irreparable damage will result if a stay is not granted."

On a factual situation that finds striking parallels in the instant case, the court in *Stott* found it necessary to deny a restraint where there was no showing to support the specific finding of irreparable damage required by Section 2284(3).

The intractable condition to the grant of temporary restraining order and interlocutory injunction is the threat of irreparable injury. This is the statutory requirement (28 U.S.C. § 2284(3); 5 U.S.C. § 1009(d)). It was not satisfied by the action of the court below. It was clear, unmitigated error to make findings of irreparable injury—and to restrain a Commission order directing cancellation of rate increase

schedules. Appellants suggest that the issue warrants plenary review, not only because the amounts involved in restitutional recovery are very large, but because the problem is one of recurring incidence in motor carrier revenue cases. In its handling of the temporary restraining order and the application for interlocutory injunction, the court below pursued a course that appears in open conflict with decisions in at least three other districts (JS 16). The issue merits authoritative resolution.

2. A related problem raised on this appeal overtakes the question of what the district court did in restraining the Commission order. That problem is what the court did not do with respect to the carriers' application for interlocutory injunction and appellants' motions for countervailing relief as conditions to restraint of the Commission's order.

The court failed to rule on appellees' application for interlocutory injunction or on any of the motions presented by appellants (JS 14-15). Indeed, on November 4, 1966, when the matter came on for hearing, the court announced by order of that date (Appendix, Appellants' Brief in Opposition) that it was unable then to decide the application. It was silent as to appellants' motions. The court in fact never issued a decision on any of the motions or on the application for interlocutory injunction. Appellants' first intimation that it did not intend to do so came on January 5, 1967, when it handed down its memorandum opinion and order on the merits.

The statute, 28 U.S.C. §§ 2284(3) and (4), makes it clear that the drastic remedy of temporary restraint

is not only strictly conditioned as to ground, but closely limited as to time-span. It is issued by a single judge only where an application for interlocutory injunction is made. It remains in force only until hearing and determination by the three-judge court of the application for interlocutory injunction which, the statute stipulates, is to "be given precedence and assigned for a hearing at the earliest practicable date". Contravention of these requirements operated to deprive appellants of important remedial alternatives and prejudiced their substantial rights.

Appellants' motions were for an indemnity bond; for an order to protect shippers from financial loss against wrongful restraint; for an order to limit restraint to those 15 carriers who were plaintiffs in the action, so as to leave unaffected the remaining 1400 tariff participants who neither sought review nor restraint of the Commission's order. These motions invoked remedial alternatives designed to insulate the public from pecuniary injury should the court below grant appellees' motion for interlocutory injunction. Appellants, while exposed to the inimical consequences of restraint, were deprived of protective conditions. But the ultimate deprivation resides in the district court's failure to comply with Section 2284 which required prompt, definitive ruling on the application for interlocutory injunction. That ruling was never made. Appellants thus never had the opportunity afforded by 28 U.S.C. § 1253 to appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory injunction.

As the court never acted on the motion for interlocutory injunction or appellees' motions for remedial

alternatives, but simply decided the case on the merits on January 5, 1967, appellants pursue the only course open to them as parties aggrieved by the court's action, in prosecuting this appeal from that judgment and in assigning these matters as error.

3. The memorandum describes the district court's ruling on the merits as a holding that the Commission's final order was fatally unclear. It cites the Commission's "speedy issuance of a new order" as rendering the issue moot and a matter "of merely academic interest". Appellants suggest that none of these characterizations accurately describe the question presented for review on this appeal.

A reading of the district court's opinion (JS App. A) discloses that far more is embraced in its decision than a determination that the Commission's "final order was fatally unclear". The court is preoccupied, not with the order, but with the Commission's report. So far from a simple holding that the Commission's order was unclear, the court articulates disagreement with the standards of proof applied by the Commission and the Commission's evaluation of the evidence. Thus, the court declares it to be "an obvious question" whether the quantum of proof adduced by the carriers in the present case was equal to the proof the Commission held to be sufficient in the past (JS A4). At various points in its opinion, the court displaces the Commission's evaluation of the evidence with its own (JS A6; A7; A9). Thus, while acknowledging as a truism that "the Commission is the sole judge of the weight of the evidence before it", the court declares that the carriers "presented impressive evidence to support the proposed rate", so that the Commission's

evaluation of the evidence as failing to meet the "burden of persuasion" could not stand (JS A12-13). The court does not hesitate to indicate its preference for evidentiary criteria applied by the Commission at an earlier date but since discarded (JS A7). In final result, the district court's judgment, if allowed to prevail, would mean that the Commission is deprived of power to set standards of proof in general increase cases and of the authority to determine the weight to be accorded to evidence and the testimony of witnesses. *J.B. Acton, Inc.* v. *United States,* 221 F. Supp. 174, 177 (W.D. Mo. 1963); aff'd 376 U.S. 779.

If the district court's judgment is in error, the Commission's response to the remand cannot operate to render the issue moot. Appellants are parties aggrieved by the lower court's decision. Their interest is visibly substantial. If ascertained error cannot be presented to this Court for review, their interests are effectively extinguished. This consequence is in no wise inhibited or lessened by the Commission's response to the district court's remand. Indeed, the Commission's second order, and the events which followed it, establish indisputably that, if this appeal cannot be maintained, on grounds of mootness, appellants have lost not only the right to appeal afforded them by 28 U.S.C. § 1253, but their remedy for restitutional recovery.

The Commission's second order reaffirms the findings and conclusion of the first report and order (JS App. C). The order again directs the carriers to cancel the schedules found not shown justified and fixes a compliance date. Unlike the first order, it includes a stay should court action be instituted by the

carriers, in which case postponement of the effective date is to continue pending review proceedings. As speedy as the issuance of this new order, was the carriers' invocation of judicial review (JS 8). Thus, the second order is effectively stayed pending judicial review and shippers disabled from applying to the reviewing court for indemnity bond or other means of protection from irreparable financial loss.

Appellants' status as parties aggrieved, their right to appeal under § 1253, their remedy for restitutional recovery, prevent the acquiescence of the government parties and the Commission's response to the district court's order of remand from rendering this appeal moot. The questions presented by this appeal are, in all respects, viable, substantial, and warrant plenary review by this Court. They call compellingly for authoritative resolution. Indeed, their affirmative determination on this appeal will render moot the action instituted by the carriers in the district court to review the Commission's second order.

Of *Boston & Maine R. Co.* v. *United States,* 358 U.S. 68, this must be said. The decision of the Supreme Court in dismissing both appeals there filed, was limited solely to the question of the Commission's jurisdiction which it found "prematurely presented for decision". It dismissed without prejudice to raising the issue again. It is noteworthy that no invidious consequences were visited on the appellants in that case by dismissal. In No. 310, the appellants obtained, under the district court's decision, the further investigation they sought. In No. 322, the appellants declared: "The complainants did not seek money damages." It is suggested that the pertinent

authorities here, on the question of warrant for and utility of review by this Court, are *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, and the other cases cited in the Brief in Opposition (pp. 11-13).

For these reasons, appellants respectfully suggest that the questions presented on this appeal are substantial and warrant plenary review.

Respectfully submitted,

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